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Simon Debartelo Group a/w M. S. Management Associates, Inc. and Local 32B-32J, Service Employees International Union.¹ Case 29–CA–23218–1

May 31, 2006

ORDER REMANDING PROCEEDINGS

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

On December 1, 2000, Administrative Law Judge Howard Edelman issued the attached decision in this case. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel and the Charging Party filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Consistent with our decision in *Dish Network Service Corp.*, 345 NLRB No. 83 (2005), the Board has decided to remand this case in order for another judge to review the record and issue an appropriate decision.²

In this case and in many others, the same judge has copied extensively from the General Counsel's brief in his decision. In each case, the judge then decided the case in favor of the General Counsel.³ Our comparison of the General Counsel's brief and the judge's decision reveals that the majority of the judge's decision was copied verbatim from the General Counsel's posthearing brief. The judge copied verbatim from the General Counsel's brief in both his factual statement and his legal discussion.

In *Dish Network*, 345 NLRB No. 83, slip op. at 1, we said:

'[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal.' *Indianapolis Glove Co.*, 88 NLRB 986 (1950).

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

² Member Liebman dissents from the remand order for the reasons stated in her dissent in *Regency House of Wallingford*, 347 NLRB No. 15 (2006).

³ See *CMC Electrical*, 347 NLRB No. 25 (2006); *Eugene Iovine*, 347 NLRB No. 23 (2006); *Regency House of Wallingford*, 347 NLRB No. 15 (2006); *Trim Corp.*, 347 NLRB No. 24 (2006); *J.J. Cassone Bakery, Inc.*, 345 NLRB No. 111 (2005); *Dish Network Service Corp.*, 345 NLRB No. 83 (2005); *Fairfield Tower Condominium Assn.*, 343 NLRB No. 101 (2004).

See *Reading Anthracite Co.*, 273 NLRB 1502 (1985); *Dayton Power & Light Co.*, 267 NLRB 202 (1983).

Considering the instant case in the context of all of these cases as a whole, the impression given is that Judge Edelman simply adopted, by rote, the views of the General Counsel and failed to conduct an independent analysis of the case's underlying facts and legal issues.

We recognize that the Respondent did not specifically except to the judge's extensive copying. However, that fact does not, and should not, preclude the Board from taking corrective measures. It is the Board's solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality.

We understand that this remand delays the issuance of a Board decision, and this may inconvenience the parties. However, we believe that the fundamental necessity to insure the Board's integrity outweighs these considerations.

In order to dispel this impression of partiality, we will remand the case to the chief administrative law judge for reassignment to a different administrative law judge. This judge shall review the record and issue a reasoned decision.⁴ We will not order a hearing de novo because our review of the record satisfies us that Judge Edelman conducted the hearing itself properly.

ORDER

IT IS ORDERED that the administrative law judge's decision of December 1, 2000 is set aside.

IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for reassignment to a different administrative law judge who shall review the record of this matter and prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C., May 31, 2006

⁴ The new judge may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by considering "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *RC Aluminum Industries, Inc.*, 343 NLRB No. 103, slip op. at 1 fn. 2 (2004), quoting *Daikichi Sushi*, 335 NLRB 622, 623 (2001)(internal quotation marks and citations omitted). Alternatively, the new judge may, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In doing so, the new judge will have the authority to make his/her own demeanor-based credibility findings.

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter N. Kirsanow,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Haydee Rosario, Esq. for the General Counsel.

Douglas J. Heckler, Esq. (Barnes & Thornburg), for the Respondent.

Rebecca Schleifer, Esq. Larry Engelstein, Esq. (SEIU), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on June 20, 2000, in Brooklyn, New York.

Pursuant to a charge filed by Local 32B-32J, Service Employees International Union, AFL-CIO, herein called the Union, a Complaint and Notice of Hearing issued on March 20, 2000, alleging that Simon DeBartelo Group, a/w M.S. Management Associates, Inc., herein called Respondent, at its Roosevelt Field and Smith Haven Malls, herein called the Malls, violated Section 8(a)(1) of the Act, by inter alia, informing employees that Union solicitation was not permitted at the Malls; engaging in surveillance of employees' Union activities; directing employees to cease distribution of Union leaflets to the public and to leave its parking lot; summoning the Suffolk County Police to have employees who were distributing Union leaflets removed from the parking lots of the Malls, and threatening employees to call the police and report them if they continued to distribute Union leaflets to the public.

On the entire record in this case, including, my observations of the demeanor of witnesses, and briefs filed by Counsel for the General Counsel, Counsel for the Union, and Counsel for the Respondent, I make the following

FINDINGS OF FACT

Respondent, is a Delaware corporation, owns and manages numerous shopping malls throughout the United States, including the Smith Haven and the Roosevelt Field Malls, herein collectively called the Malls, which are located in Suffolk and Nassau counties respectively, in the State of New York. During the past twelve month period, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations, derived gross rent revenues from stores located in the malls in excess of \$100,000, of which in excess of \$25,000 was derived from Federated Stores, Inc.

Federated Stores, Inc., is engaged in the retail sale of goods, and leases stores from Respondent at its Smith Haven Mall, and

its Roosevelt Field Mall. During the past twelve month period, which period is representative of its annual operations generally, in the course and conduct of its business operations, Federated Stores, Inc., purchased and received at its New York facilities, goods valued in excess of \$50,000 directly from enterprises located outside the State of New York.

It is admitted that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent contracted its janitorial and maintenance services for the Malls to Control Services Inc., herein called Control. In or about July 1999, the Union began its campaign to organize the maintenance employees at various Long Island shopping malls, including the employees of Control employed at the Malls. As part of the organizing drive, certain employees of Control who worked in the Malls assisted the Union with its campaign by distributing Union leaflets to other employees and the public.

With respect to the distribution of literature at the Malls, Respondent maintains posted rules to the public which state, inter alia, that "picketing, distributing handbills, soliciting and petitioning require prior written consent of mall management". Respondent has an access permit policy which requires individuals wishing to solicit or distribute materials at the Malls to complete an application to obtain use of the common areas in the Malls.

The Union began an organizing campaign to organize the employees of Control working at Respondents malls sometime in August 1999.

On or about August 19, Kevin Stavris, Angel Gonzalez and Francisco Chang, the Union representatives involved in the organizing drive, met at the Roosevelt Field Mall with about 5 to 10 employees employed by Control. The Union representatives initially met employees inside the Mall in an area adjacent to Sbarro's restaurant on the first floor of the mall. While the employees and organizers were outside Sbarro's restaurant. Angelo Scala, the Director of Security at the Roosevelt Field Mall, and an admitted supervisor within the meaning of Section 2(11) of the Act, approached the employees and informed them that soliciting was not allowed in the Mall. Because of Scala's objection, the organizers and employees entered the Sbarro's restaurant where they met while having pizza. However, Scala did not leave the area when the employees entered the restaurant. Rather, he stayed in front of the restaurant observing the employees and the organizers through a glass window, which separates the Sbarro's Restaurant from the Mall corridors. Stavris, the Union organizer, testified that Scala and other Respondent's representatives remained standing in front of the restaurant for about fifteen minutes observing the employees and the union representatives who were inside the restaurant.

Scala, testified that immediately after he told the employees and Union organizers that they could not congregate in the common area, the group moved inside Sbarro's restaurant where they continued their meeting. Scala testified that he stood in front of the Sbarro's restaurant to observe the employees because he wanted to ensure that the group would not come

out to the common area. According to Scala, he stayed at least 5 minutes observing the group inside the restaurant. Scala also admitted during his testimony that he reported the employees' meeting with the Union representatives to Respondent's higher management. In this regard, Scala stated that he reported "Just who was there, that they were union, their representatives was there and some of the employees of Control..."

On or about August 28th, about 5 to 8 employees of Control distributed Union leaflets on the sidewalk in front of the entrance to the Smith Haven Mall which is located in front of the food court of the Mall. That day, the employees also distributed leaflets in the parking lot of the Smith Haven Mall. The employees were accompanied by Kevin Stavris, Johnny Patterson, Alberto _____, Carlos Cortez and Howard Raze, the Union organizers. It is undisputed that the employees distributing Union leaflets were regularly assigned to work at the Smith Haven Mall and that the Union leafleting occurred during employees' nonworking time. The leaflet distributed on August 28 at the Smith Haven Mall, is entitled "Important Shoppers Advisory", and states, inter alia, the following:

'We are appealing for your support in our effort to unionize because Control Services is NOT TREATING US FAIRLY ...'

Ask SIMON administration to do the right thing.

Ask them why they are using a contractor that is unfair to workers.

Ask them to use a contractor that respects workers rights . . .

On August 28, Respondent's agents at the Smith Haven Mall directed employees of Control to cease distributing Union leaflets to the public and to leave the sidewalk of the Mall and the parking lot. Kevin Stavris testified that Trombino, the Director of Security at the Smith Haven Mall, and an admitted supervisor within the meaning of Section 2(11) of the Act approached the group of employees and organizers and told them that "This is not going on here today." Stavris further testified that about six police cars arrived at the scene. The Police told the employees and organizers that they could not distribute the flyers at the Mall because of Respondent's objections. While Stavris was discussing with the police, the employees' right to distribute the Union leaflets, Dennis Hejen, Respondent Manager of Smith Haven Mall, approached the group which was in the parking lot. The uncontroverted testimony of Stavris establishes that, after some discussion with the police, Hejen "yelled" to the police to arrest the employees and organizers if they stayed in Respondent's property.

On or about September 24th, at the Roosevelt Field Mall, two employees of Control distributed Union leaflets to the public. The employees were standing on the sidewalk outside the Grand entrance to the Mall. It is undisputed that the Roosevelt Field Mall was the regular work place for these two employees and that they were leafleting during their nonworking time. The leaflet, entitled "Important Shoppers Advisory," is the same as the one distributed by employees on August 28th, at the Smith Haven Mall. At the time, Respondent's agents told two employees that they were not allowed to distribute the Union leaflets on Respondent's property and that if they continued to

do so, they would be arrested. They did not distribute the leaflets.

On October 20, the employees of Control, accompanied by the Union organizers, met with Respondent's manager, Jim Lundgren. During their meeting, the employees gave Lundgren a letter dated October 20, addressed to him. In the letter, employees informed Lundgren, in part, of certain problems encountered by employees with their maintenance work and the conditions of the bathrooms in the Malls. The letter also stated that employees are "concerned that [they] will get disciplined because customers may see and report problems with the maintenance and bathrooms." It further stated that the employees have reported the conditions enumerated in the letter to the supervisors of Control, but that the problems have not been resolved.

On October 23, employees of Control whose regular work place was the Smith Haven Mall distributed Union leaflets to the public. The employees were accompanied by the Union organizers. While distributing the Union leaflets, they were standing on the sidewalk outside the main entrances to the Smith Haven Mall. These employees were on their nonworking time. It is undisputed that Respondent's agents directed the employees of Control to cease distributing Union leaflets to the public and threatened to call the police if they continued to distribute leaflets to the public. The leaflets distributed to the public contained pictures of cockroaches, and stated, in part, "Here's What Control Workers-The Cleaning Contractor at Smith Haven Mall-Face When We Take Our Lunch Breaks!". Trombino, Respondent Security Director, testified that he was present during the employees' handbilling to the public. He testified that, with the exception of one individual, employees were "civil" and that they were just leafleting. He claimed, however, that one of the individuals distributing the flyers was stepping up and down on a bench and got down on his stomach emulating a cockroach. However, a review of the videotape in evidence which covers the leafleting at the Smith Haven Mall on October 23, does not show any disruptive conduct on the part of any of the individuals in handbilling. The recording of the leafleting in front of the Smith Haven Mall begins at about 12:42 p.m., and it shows employees peacefully distributing the leaflets to the public. At about 12:46 p.m., the recording shows that the first security guard approached the employees handbilling, and at about 12:48 p.m., an individual who appears to be Trombino also approached the group. The security officers remained with the group while they were handbilling until approximately 1:12 p.m., when the employees and other individuals leafleting had to leave the entrance of the Mall. The recording does not show any disruptive conduct on the part of the employees or organizers who were leafleting.

Analysis and Conclusions

Whether an employer's observations of the employees' union activities constitutes unlawful surveillance involves a determination of whether, under the circumstances, the conduct would tend to interfere with, restrain, or coerce employees in their right to organize under Section 7 of the Act. *Metal Industries*, 251 NLRB 1523 (1980).

The totality of the circumstances in this case show that on August 19, the Respondent's observations of employees' meeting with the Union organizers by Security Director Scala in the Sbarro's restaurant at the Roosevelt Field Mall, unlawfully interfered with employees' union activities. Scala's observations were part of Respondent's efforts to keep employees' Union activities out of the Malls, including its public and non-sales areas such as the restaurant. This is also evidenced by Respondent's admission that employees were not allowed to peacefully distribute Union literature in their nonworking time and in nonsales areas. Specifically, Scala's testimony that he stood outside the Sbarro's restaurant to observe employees meeting immediately after he told them that they were not allowed to solicit at the Mall, is sufficient to establish unlawful interference with employees Union activities.

Scala's testimony that he stood outside the restaurant just to ensure that employees' would not come out to the common areas is disingenuous, unconvincing, and not credible. Scala's testimony indicates that employees did not pose any challenge to his request for them to move out of the Mall's corridor. Thus, there was no reasonable basis for him to think that once employees were inside, sitting down ordering pizza, they would again come out of the restaurant to stand in the same place where they were asked to move. Further, Scala's testimony that he reported the meeting to Respondent, i.e., "Just who was there, that they were union, their representative was there and some of the employees of Control . . . , is sufficient to establish that he stood in front of the Mall to unlawfully surveille employees' union activities and it was intended to discourage them from engaging in any Union activities at the Malls. *Eddyleon Chocolate Corp.*, 301 NLRB (1991), where the Board found that the employer engaged in unlawful surveillance when president of the company closely observed Union leafleting while speaking on the car and later ordered participants to leave premises). Respondent's message was clear, it did not want employees at the Malls meeting with their union organizers and it did not want them distributing union leaflets in any part of the Malls.

In view of the absence of any evidence of disruptive conduct on the part of the employees or organizers, I conclude Scala's surveillance of employees' union meeting and his report to Respondent of the employees meeting with their Union organizers, is violative of Section 8(a)(1) of the Act.

It is well settled law that an employee has the right to distribute union literature during their non-working time and in nonworking areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Gayfers Department Store*, 324 NLRB 1246 (1997). Historically, the Courts and the Board have recognized the fundamental difference between the rights of employees to organize under Section 7 of the Act, and the rights of union organizers. *NLRB v. Babcock & Wilcox*, 351 U.S. 106 (1956). With respect to the distribution of union literature, the Supreme Court has made a "critical distinction" between employee and nonemployee solicitation. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 529 (1992). In *Lechmere*, the Court reaffirmed its holding in *Babcock & Wilcox*, that an employer may bar non-employee union organizers from its property unless there is no reasonable nontrous-

passory means for them to communicate. *Lechmere*, supra, 502 U.S. at 535. However, when the rights of employees are involved, as in the instant case, the employer's managerial rights, rather than his property rights, are at issue. *Republic Aviation*, supra; *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

The Board in *Gayfers Department Store*, 324 NLRB 1246 (1997), a case exactly like the instant case, held that the applicable standard in cases involving the rights of employees to distribute union literature during their nonworking time is the *Republic Aviation* Standard, where the Supreme Court held that an employer may not bar the distribution of Union literature by employees who are in nonworking areas of its property during their nonworking time unless the employer can show that its non-solicitation rule is necessary to maintain discipline and production. The Board further held that employees who are working regularly and exclusively on the premises of an employer other than their own, as in the instant case, are "already rightfully" on the property pursuant to their employment relationship. *Gayfer*, 324 NLRB at 1250 quoting *Southern Service*, 300 NLRB 1154 (1990), enfd 954 F.2d 700 (11th Cir. 1992) and *Hudgen*, supra 424 U.S. at 521 fn. 10.

Gayfer involved Union leafleting during an organizing drive by electrical employees who were assigned to work at *Gayfer's* department stores pursuant to their employment relationship with Baroco. *Gayfer* had a published no solicitation rule which prohibited the distribution of written or printed materials in the selling areas of any time during store's opened hours or at any other place on *Gayfer's* property. In applying the *Republic Aviation* standard, the Board held that *Gayfer* violated Section 8(a)(1) of the Act, when it interfered with employees' handbilling at the entrances of its stores during their nonworking time in nonsales areas. In addition, the Board held that *Gayfer's* no solicitation rule was overly broad and in violation of Section 8(a)(1) of the Act, because it prohibited solicitation and distribution in non-selling areas of the premises, including the exterior areas, during break times and between employees' shifts. *Gayfer*, 324 NLRB at 1251 citing *Our Way, Inc.*, 268 NLRB 394 (1983).

In the instant case, the underlying facts relating to Respondent's interference with the right of Control employees to distribute Union literature are undisputed. The Malls of Respondent is the place where Control employees are regularly assigned to work. On August 19, August 28, September 24 and October 23, Control employees were distributing union leaflets during their nonworking time in nonsales areas outside the Malls. Specifically, they were on the sidewalk in front of the entrances of the Malls and in the parking lots of the Malls. With the exception of the October 23 incident at Smith Haven Mall, it is also undisputed that the employees' leafleting was peaceful and that their conduct consisted only in distributing the union leaflets. Thus, the totality of the uncontroverted record shows that the Control employees' distribution of literature was protected under the *Republic Aviation* standard. Respondent did not submit any evidence to show that, consistent with *Republic Aviation*, the employees' leafleting should not be protected because it interfered with the operations and maintenance of the Malls.

Under Board law, an employer may also ban distribution of literature on selling areas or selling floors. See *J.C. Penny Co.*, 266 NLRB 1223 (1983). However, the record evidence in the instant case shows that Control employees were distributing the Union leaflets in nonsales areas outside the Malls. Thus, the justification articulated by the Board in *J.C. Penny* for banning employees' handbilling in stores, is not applicable in the instant case. Respondent's contention that, as a property owner, it had the right to ban the employees' distribution of literature to protect its customers and its business, is not supported by the record evidence since Respondent did not show any disruption in its operations and is not supported by the law which provides that employees can peacefully handbill customers of mall stores. *DeBartelo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 583-588 (1988).

Further, Respondent's posted rules banning the distribution of written materials and solicitation in common areas without first obtaining a permit from Respondent. An employer's rules which prohibit solicitation and distribution during employees' nonworking time and in nonwork areas is presumptively unlawful. *Ichikoh Mfg.*, 312 NLRB 1022 (1993), where the Board found unlawful a rule requiring prior written consent for solicitation and distribution of literature). See also *Our Way, Inc. supra*. In some instances, the Board had held such overly broad rules to be lawful if an employer can show that it communicated or applied the rule in a manner that it showed employees its intent to permit solicitation during their nonworking time. *Our Way, Inc.* 268 NLRB at 395 fn. 6 (citing *Essex International, supra*). However, the evidence in the instance case does not show that such clarification was made by Respondent. To the contrary, the stipulated record shows how Respondent repeatedly informed employees during their nonworking time and in nonsales areas that solicitation was prohibited at its facilities. In view of the foregoing, I conclude Respondent's posted rules are in violation of Section 8(a)(1) of the Act.

With exception of the August 28 threat to arrest employees for distributing Union leaflets at the Smith Haven Mall, Respondent admits that it engaged in the conduct alleged in the instant Complaint relating to the distribution of Union literature. The uncontroverted testimony of Union organizer Stavris shows that on August 28, in the parking lot at the Smith Haven Mall, Respondent's manager Hejen "yelled" to the police to arrest employees for distributing Union leaflets in its parking lot. Thus, the conduct of Respondent, as alleged in the Complaint, is undisputed.

Respondent contends that the facts of the instant case are controlled by the Supreme Court's holding in *Lechmere*, and that Republic Aviation must be reading light of, and limited by *Lechmere*.

In fact, the reverse is true. Despite the Court's board language, *Lechmere* has only a limited effect. By own terms, *Lechmere* applies only to nondiscriminatory prohibitions on nonemployee attempts to communicate with employees on the employer's property, See *John Ascuaga's Nugget v. NLRB* 968 F.2d, 991, 997-998 (9th Cir. 1992).

The instance case is clearly controlled by Republic Aviation and *Gayfers*. Accordingly, I conclude that based upon Respondent's conduct described above, Respondent violated Section

8(a)(1) of the Act by: informing Control employees that Union solicitation was not permitted at the Malls; directing employees to cease distributing Union leaflets to the public and asking them to leave the Malls; calling the Suffolk County Police to have the Control employees removed from the Malls and the parking lots because they were distributing Union leaflets; and by threatening Control employees that Respondent would call the police if they did not cease distributing Union leaflets and leave the Malls' premises.

An employee may communicate with a third party in an effort to obtain the third party's assistance in circumstances where the communication is related to a legitimate labor dispute between the employees and their employer. *Emarco, Inc.*, 284 NLRB 832, 833 (1987) citing *NLRB v. Electrical Workers Local 1229,s*, 346 U.S. 464 (1953) (*Jefferson Standard*); (*Allied Aviation Service Co.*, 248 NLRB 229 (1980) citing *Richboro Community Mental Health Council, Inc.*, 242 NLRB 1267 (1979). The Board has also held that harsh criticism of an employer's product or inadequate and unsanitary conditions is protected under the Act, where the communication raises issues related to the employees' working conditions. *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 812-813 (2d Cir. 1980). Thus, the threshold question is whether the communication constitutes concerted activity. Once a determination is made that the communication is protected, it is the employer's burden to show the communication in question is malicious in nature. *Springfield Library & Museum*, 238 NLRB 1673 (1979).

Generally, with respect to the element of malice, Respondent has the burden of establishing that "the words were published with the knowledge of their falsity or with a reckless disregard of whether they were true or false". *Diamond Walnut Growers*, 316 NLRB at 36, 47 (1995), enfd. in part and denied in part 113 F.3d 1259 (D.C. Cir. 1997), citing *Springfield Library & Museum*, 238 NLRB 1673 (1979). However, "specificity and/or articulation are not the touchstone of union or protected activity." *Diamond Walnut Growers*, 316 NLRB at 47, citing *Springfield Library & Museum, supra*. The Board has held that in the context of an emotional labor dispute, remarks that reflect bias or hyperbole will not be considered reckless or maliciously untrue as to lose the protection of the Act. *Emarco, Inc.*, 284 NLRB 832 (1987). Furthermore, in *Diamond Walnut*, where employees urged the public to boycott the company, stating, in part, that scabs were packing 'walnut with mold, dirt, oil, worms and debris', the Board found that the communication was not maliciously false and that it was protected because it related to an ongoing labor dispute. *Diamond Walnut Growers*, 316 NLRB at 46.

In the instant case, the language in the flyer distributed to the public on October 23rd at the Smith Haven Malls shows that the remarks were related to the employees' working conditions. The flyer, which states, in part, that, "Here's what Control workers-the Cleaning Contractor at Smith Haven Mall-face when we take our lunch", and that "Control workers do not want to lose their jobs because of consumer dissatisfaction." Clearly relates to the employees' concerns about their working conditions. It is undisputed that Control employees used the food court of the Mall to take their lunch or that the communi-

cation related to their working conditions of Control employees. In addition, the October 20 letter, which was hand delivered to manager Lundgren before distributing the flyer, shows that the employees were concerned that the sanitary conditions at the food court would lead to disciplinary action by Control against them for a situation, which according to the employees', should be remedied by Control or Respondent. The remarks in the flyer as well as the October 20 letter are sufficient to show that the employees' communication with the public on October 23 seeking its' assistance, is protected under the Act.

Respondent failed to submit any evidence to show that the statement concerning the presence of cockroaches in the food court was maliciously false or reckless. Similarly, Respondent failed to show that the conduct of employees during their distribution of the leaflets was disruptive of their operations. The videotape in evidence shows that all of the individuals who were handbilling were doing so in a peaceful and civil manner. The testimony of Trombino, Respondent's Security Director, asserting that one of the employees distributing flyers was emulating a cockroach, is not sufficient to deem the employees' conduct unprotected. Further, Trombino's testimony is not supported by the videotape in evidence. The videotape shows when Respondent's security officers first approached the group of individuals' handbilling and how the officers remained with the group until they left. The videotape does not show any individual on the grounds emulating a cockroach. Even, assuming arguendo, that Trombino's testimony is true, I would still conclude that under Board precedent, the conduct is still protected because such emotional display, hyperbole and appeal to the emotions are the type of conduct which is typical of organizing campaigns and protests relating to labor disputes. *Diamond Walnut Growers*, 316 NLRB at 47 citing *Mitchell Manuals*, 280 NLRB 230 (1986).

CONCLUSIONS OF LAW

1. Simon DeBartelo Group a/w M.S. Management Associates, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. Local 32B-32J, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, as set forth above in the Analysis section, and in the Order, below has committed various violations within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices offset commerce within the meaning of Section 2(6), (7) and (8) of the Act.

THE REMEDY

Having found Respondent has engaged in unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

On the foregoing findings and conclusions and the entire record, I issue the following recommended.¹

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Simon DeBartelo Group, a/w M.S. Management Associates, Inc. Smith Haven Mall, Lake Grove, New York, New York, and Roosevelt Field Mall, Camden City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Surveilling its employees activities on behalf of Local 32B-32J, Service Employees International Union, AFL-CIO.

(b) Promulgating and enforcing a no solicitation provision which prohibits its employees from distributing Union literature in non-working areas of Respondents Roosevelt Field and Smith Haven Malls, herein the Malls, during non-working time.

(c) Informing and directing its employees that solicitation of Union literature in nonworking areas of its Malls, during non-working time is not permitted.

(d) Threatening to summon police in order to remove its employees from attempting to distribute Union literature in non-working on its Malls and during non-working time.

(e) Summoning police to remove its employees from distributing Union literature at its Malls in non-working areas and during non-working time.

(f) In any like or related matter interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Rescind and annul the no-solicitation/no-distribution rule, described above, insofar as it forbids solicitation of Union membership and distribution of materials protected b Section 7 of the Act, anywhere on its premises by its own employees or by employees otherwise employed t work on its premises during nonwork time.

(b) Within 14 days after service by the Region, post at its mall facilities in Smith Haven and Roosevelt Field, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employed by the Respondent at any time since December 21, 1999.

Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

Dated, Washington, D.C. December 1, 2000

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT surveil our employees activities on behalf of Local 32B-32J, Service Employees International Union, AFL-CIO.

WE WILL NOT promulgate or enforce a no solicitation provision which prohibits our employees from distributing Union literature in non-working areas of our Roosevelt Field and Smith Haven Malls, herein the Malls, during nonworking time.

WE WILL NOT inform or direct our employees that solicitation of Union literature in non-working areas of our Malls, during non-working time is not permitted.

WE WILL NOT threaten to summon police in order to remove our employees from attempting to distribute union literature in non-working on our Malls and during non-working time.

WE WILL NOT summon police to remove our employees from distributing Union literature at our Malls in nonworking areas and during nonworking time.

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind and annul the no-solicitation/no-distribution rule, described above, insofar as it forbids solicitation of Union membership and distribution of materials protected by Section 7 of the Act, anywhere on our premises by our own employees or by employees otherwise employed to work on our premises during nonwork time.

SIMON DEBARTELO GROUP/W M.S. MANAGEMNT
ASSOCIATES, INC.